HERRICK, FEINSTEIN LLP
Attorneys for Grand Pacific Finance Corp.
Stephen B. Selbst
Hanh V. Huynh
2 Park Avenue
New York, New York 10016
(212) 592-1400
sselbst@herrick.com
hhuynh@herrick.com

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
ARYE JOSEPH BOBKER,	:	Case No.: 16-23683 (RDD)
Debtor.	:	

OBJECTION OF GRAND PACIFIC FINANCE CORP. TO THE DEBTOR'S SECOND APPLICATION PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 1007(c) FOR AN ORDER EXTENDING TIME TO FILE SCHEDULES OF ASSETS, LIABILITIES AND STATEMENTS OF FINANCIAL AFFAIRS AND GRANTING RELATED RELIEF

TO: THE HONORABLE ROBERT D. DRAIN, UNITED STATES BANKRUPTCY JUDGE

Grand Pacific Finance Corp. ("Grand Pacific"), by and through its counsel, Herrick, Feinstein LLP, hereby objects to the Debtor's Second Application Pursuant to Federal Rule of Bankruptcy Procedure 1007(c) for an Order Extending Time to File Schedules of Assets, Liabilities and Statements of Financial Affairs and Granting Related Relief (the "Application"), and in support of its objection, respectfully represents as follows:

1. The Application should be denied and the above-captioned debtor (the "Debtor"), should be required to file his schedules of assets and liabilities and statement of

financial affairs immediately. The Debtor and his sons Eli Mordechai Bobker and Benny Boruch Bobker, both of whom have filed companion chapter 11 cases in this Court (collectively, the "Bobkers"), have a long and well-documented history of flouting discovery and disclosure obligations. The Application is a continuation of the Bobkers' pattern of refusing to provide information regarding their assets, liabilities, and the means by which they support themselves in comfortable lifestyles, all the while hindering and delaying Grand Pacific's efforts to collect on its judgments against them.

2. Indeed, the Debtor's chapter 11 case, and the companion chapter 11 cases filed by Eli Bobker and Benny Bobker, were commenced shortly after Justice Jaffe issued an order on December 2, 2016 in an action pending in Supreme Court, New York County (the "New York County Action"), holding each of the Bobkers in contempt (the "Contempt Order") for failing to comply with an order dated October 20, 2015, directing each of them to make installment payments to Grand Pacific in respect of judgments against each of them. A copy of the Contempt Order is attached hereto as Exhibit A.

3. In the Contempt Order, Justice Jaffe ordered that each of the Bobkers be incarcerated because "the Bobkers have not paid the judgment ***and they ignored numerous post-judgment disclosure devices, requiring plaintiff to bring multiple motions seeking their compliance and/or holding them in contempt.***" Contempt Order at 3 (emphasis added).

4. The Bobkers have been flouting discovery demands and court orders for years. In a decision and order in the New York County Action dated January 5, 2015 (the "Installment Order"), on Grand Pacific's request for an installment payment order, Justice Jaffe found that:

> [D]efendants lack of forthrightness and failure to comply with discovery and the charging order, particularly Joe's willful blindness concerning his

> own finances, and his failure to produce recent financial documents, including those as rudimentary and easy to disclose as tax returns, warrant the reasonable inference that had they complied, the material disclosed would show that they receive funds from undisclosed sources.

Installment Order at 20, a copy of which is attached as Exhibit B.

5. Justice Jaffe is not alone in finding the Bobkers' testimony unreliable. In an earlier installment payment order proceeding involving Joe Bobker, Judge Rakoff found that his testimony was "evasive and incredible." *Lowy v. Bobker*, 383 F.Supp.2d 606 (S.D. N.Y. 2005).

6. Finally, the purported cause alleged by the Debtor in the Application is insufficient and disingenuous; its pretextural nature is illustrated by two salient facts: (1) the Application cites poor weather as a basis for an additional adjournment, when in fact the New York metropolitan area has experienced an exceptionally mild winter to date, and (2) the Application further discloses that Joe Bobker intends to seek yet another adjournment of his section 341 meeting, which was originally scheduled for January 4, 2017 and then rescheduled for January 25 after the first extension of time was granted. The Bobkers are once again trying to game the system, seeing how long they can get away with intransigence and disobedience.

CONCLUSION

For the foregoing reasons, Grand Pacific respectfully requests that the Application be denied, that the Debtor be directed to file his schedules of assets and liabilities and statements of financial affairs immediately, and that the Court grant such other relief as may be just and proper.

Dated: New York, New York
January 5, 2017

HERRICK, FEINSTEIN LLP

By: *__/s/Stephen B. Selbst__*
Stephen B. Selbst
2 Park Avenue
New York, New York 10016
(212) 592-1400
(212) 592-1500 (fax)
hhuynh@herrick.com
Attorneys for Grand Pacific Finance Corp.

CERTIFICATION OF SERVICE

I, Stephen B. Selbst, hereby certify that I caused a true and correct copy of the foregoing document to be served electronically upon the parties registered for electronic service in this action through the Court's CM/ECF system.

By: */s/Stephen B. Selbst*
Stephen B. Selbst

EXHIBIT A

INDEX NO. 601164/2009
NYSCEF DOC. NO. 385
RECEIVED NYSCEF: 12/06/2016

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C.
Justice

PART 12

Index Number : 601164/2009
GRAND PACIFIC FINANCE
vs.
97-111 HALE, LLC
SEQUENCE NUMBER : 015
PUNISH FOR CONTEMPT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 12/2/16

______, J.S.C.
HON. BARBARA JAFFE

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 12

GRAND PACIFIC FINANCE CORP.,

Plaintiff,

- against -

97-111 HALE, LLC, 100-114 HALE, LLC, HALE CLUB, LLC, ELI BOBKER, BEN BOBKER, and JOE BOBKER,

Defendants.

Index No. 601164/09

Mot. seq. no. 015

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Paul H. Schafhauser, Esq.
Herrick, Feinstein LLP
2 Park Ave.
New York, NY 10016
212-592-1400

For Bobker defendants:
Jonathon D. Warner, Esq.
Warner & Scheuerman
6 W. 18th St., 10th Fl.
New York, NY 10011
212-924-7111

By notice of motion, plaintiff moves pursuant to CPLR 5251 and Judiciary Law 753 for an order holding defendants Joseph Bobker, Eli Bobker, and Ben Bobker (collectively, the Bobkers) in contempt for their failure to comply with an installment payment order dated October 20, 2015. Plaintiff also moves for an order directing the Bobkers to pay sanctions and a fine in the amount of plaintiff's attorney fees, costs, and expenses incurred in moving for contempt and otherwise attempting to obtain compliance with the order along with an additional fine of $250 pursuant to Judiciary Law 773, directing the Bobkers to comply with the order, and directing that if the Bobkers do not timely purge their contempt, they shall be incarcerated pursuant to Judiciary Law 770 until they comply.

The Bobkers oppose and, by notice of cross motion, move pursuant to CPLR 5240 for a protective order staying the enforcement of and modifying the order. Plaintiff opposes the cross motion.

I. PERTINENT BACKGROUND

The facts underlying this action have been set forth extensively in other decisions. As pertinent here, in 2011, judgment was entered against Eli, Ben, and other defendants for approximately $11 million, and against Joe and defendant Hale Club for approximately $2.5 million. The Bobkers have not paid the judgment and they ignored numerous post-judgment disclosure devices, requiring plaintiff to bring multiple motions seeking their compliance and/or holding them in contempt. (NYSCEF 307).

By decision and order dated January 8, 2014, I granted plaintiff's motion for an installment payment order against the Bobkers, and referred the matter to a special referee to hear and determine the reasonable value of their services rendered to various entities and projects and their reasonable living requirements. (*Id.*).

On June 18, 2015, after hearings conducted in March and April 2015, the referee issued a report, wherein he imputed $370,000 in annual income to Joe and $830,000 to Eli and Ben each, and determined that Joe's reasonable living requirements are $296,000 a year, and Eli and Ben's are each $664,000. The referee therefore recommended that Joe make installment payments of $74,000 or $6,167 per month, and that Eli and Ben each pay $166,000 per year or $33,833 per month. (NYSCEF 328).

On or about July 1, 2015, plaintiff moved for an order confirming the referee's report. The Bobkers opposed and cross-moved for an order rejecting portions of the report and confirming the referee's finding as to their reasonable requirements. (Mot. seq. no. 14).

By amended decision and order dated October 20, 2015, I granted plaintiff's motion, confirmed the report in its entirety, and directed that the Bobkers make the payments set forth in the report. (NYSCEF 347).

On October 27, 2015, plaintiff served the Bobkers with notice of entry of the order, and requested that they pay their first installment on or before November 1, 2015. To date, the Bobkers have failed to comply with the order and have made no payments.

II. APPLICABLE LAW

The purpose of civil contempt is to compel compliance with a court order or compensate a party injured by the disobedience of a court order. (*State of New York v Unique Ideas*, 44 NY2d 345, 349 [1978]). "[T]o prevail on [such] a motion . . . the movant must demonstrate that the party charged with the contempt violated a clear and unequivocal mandate of the court, thereby prejudicing a right of another party to the litigation." (Judiciary Law § 753[A]; *Riverside Cap. Advisers, Inc. v First Secured Cap. Corp.*, 43 AD3d 1023, 1024 [2d Dept 2007]).

Generally, "the mere act of disobedience, regardless of motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party." (*Yalkowsky v Yalkowsky*, 93 AD2d 834, 835 [2d Dept 1983]). However, in cases involving responses to judgment enforcement devices, the party moving for contempt must show that the alleged contemnor engaged in wilful neglect or refusal. (CPLR 5251; *Gray v Giarrizzo*, 47 AD3d 765, 766 [2d Dept 2008]).

The party moving for contempt bears the burden of proving the contempt by clear and convincing evidence (*Riverside*, 43 AD3d at 1024), which "requires a finding of high probability" (*Matter of Eichner [Fox]*, 73 AD2d 431, 469 [2d Dept 1980], *mod on other grounds* 52 NY2d 363, *cert denied* 454 US 858 [1981]; *Usina Costa Pinto, S.A. v Sanco Sav. Co.*, 174

AD2d 487 [1st Dept 1991] [proof or standard is "reasonable certainty"]).

III. CONTENTIONS

Plaintiff asserts that the Bobkers's failure to make any payments pursuant to the order constitutes a violation of a clear and unequivocal mandate of the court, which prejudiced its right to enforce the judgments, and that their failure was wilful as evidenced by their years-long attempts to evade payment. Plaintiff maintains that the Bobkers's contemptuous behavior warrants the imposition of the requested sanctions, contending that a fine in the amount of $250 would be inadequate and ineffectual given the Bobkers's repeated failure to comply with court orders and refusal to pay any amount toward the judgment. For the same reasons, plaintiff argues that the Bobkers should be incarcerated until they comply. (NYSCEF 350).

The Bobkers argue that the basis for the issuance of the order, that they provided services without adequate compensation, is no longer relevant as Eli and Ben are now employed with annual salaries far below what the referee imputed to them and that all of their earnings are used to pay their expenses and debts, and that they have no money to pay. Joe contends that he has essentially retired from employment and currently receives income only from social security and pension payments and that he failed to pay because he cannot. (NYSCEF 368).

The Bobkers thus seek to modify the order to reflect their current income and a stay of enforcement, and deny that they are in contempt as their failure to pay arises out of their inability to do so. They also maintain that the instant application violates an order issued by the Bankruptcy Court in a bankruptcy proceeding commenced by defendants 97-111 Hale, LLC and 100-114 Hale, LLC, which enjoined and prohibited plaintiff from requesting, and the state court from issuing, any order or other relief related to plaintiff's action here or the order, which could lead to or require the arrest, detention, or incarceration of the Bobkers, pending the conclusion of a trial in a foreclosure action scheduled to commence in Supreme Court, Westchester County on December 9, 2015. They assert that the foreclosure trial had not yet concluded as of May 2016, and that the contempt motion may not be heard or decided now. (*Id.*).

In reply, plaintiff argues that it has shown that the Bobkers are in contempt of the order, and observes that they waited more than six months after the Order issued and only after plaintiff filed its motion for contempt to allege that they are unable to pay. Plaintiff also observes that the documents provided by Eli and Ben are from 2015, and that they could have moved to modify the order in 2015. Plaintiff denies that the Bobkers are entitled to a protective order, and contends that the evidence submitted is self-serving and unauthenticated hearsay, much of which was rejected by the referee. Plaintiff also maintains that the Bobkers fail to show that they receive no income other than their alleged new salaries, noting that they are funding expensive lifestyles while claiming to receive little income, an indication that they receive income from other sources. Plaintiff argues that Joe's claim that his ill health renders him unable to work was raised before the referee and rejected, and that the Bobkers have also failed to demonstrate that their expenses remain the same. Plaintiff also maintains that the Bobkers's unclean hands warrant denial of their application for a protective order. It denies that it violated the bankruptcy court order and contends that the foreclosure trial ended in December 2015, whereas it filed the instant motion in February 2016, and adjourned the return date of this motion to a date after closing arguments were held in the trial in May 2016, and that in any event, the purpose of the stay was to ensure that the Bobkers would be available to testify in the foreclosure trial, a consideration that is moot as the trial has ended. (NYSCEF 177).

IV. ANALYSIS

It is undisputed that the Bobkers violated a clear and unequivocal mandate of the court by failing to comply with the order, and that their failure has prejudiced plaintiff's right to enforce its judgments and impeded its efforts to do so. (*See* CPLR 5251 [disobedience of order related to enforcement of money judgment punishable as contempt of court]; *see also McCain v Dinkins*, 84 NY2d 216 [1994] [affirming finding of civil contempt against defendant based on disobedience of court orders]; *Astrada v Archer*, 71 AD3d 803 [2d Dept 2010], *lv dismissed in part, denied in part* 14 NY3d 922 [defendant properly held in contempt for failing to comply with court order directing her to return down payment to plaintiff; plaintiff established violation of order which prejudiced her rights]).

Plaintiff also demonstrates that defendants' failure to pay is wilful, given their lengthy history of non-compliance with other orders (*see eg Feuer v Feuer*, 46 AD2d 892 [2d Dept 1974] [defendant's history of disingenuous behavior and noncompliance with provisions in judgment sufficient to hold him in contempt]), their failure to pay anything since entry of the order in October 2015 (*see Grasso v Saidel*, 150 AD2d 916 [3d Dept 1989] [failure to make required payment earned from wages during period of regular employment is evidence of wilfulness]), and their failure to seek to modify the order or seek a protective order until after plaintiff moved for contempt (*see Brand v Brand*, 236 AD2d 229 [1st Dept 1997] [evidence of wilfulness established by, among others, defendant's failure to move for modification of payment provisions of judgment]; *see also Congregation Yetev Lev D'Satmar, Inc. v Nachman Brach Inc.*, 22 Misc 3d 1109[A], 2009 NY Slip Op 50070[U] [Sup Ct, Kings County 2009] [attorney found in contempt for failure to pay court-ordered sanction upon determination that failure was wilful; court observed that attorney neither sought stay of order nor filed notice of appeal of order]), along with their failure to show that they are unable to pay the judgment (*see infra*, ; *Sure Fire Fuel Corp. v Martinez*, 75 Misc 2d 714 [Civ Ct, New York County 1973] [debtor may be held in contempt for wilful failure to make payments under installment payment order; court should first determine debtor's financial status and ability to pay amount ordered]; *see also El-Dehdan v El-Dehdan*, 26 NY3d 19 [2015] [upholding contempt finding as defendant submitted no evidence showing inability to pay due to insufficient funds, economic distress or financial hardship, and vague and conclusory allegations of inability to pay or perform unacceptable]; *Bomze v Bomze*, 54 AD2d 631 [1st Dept 1976] [as defendant was financially able to make required payments, failure to do so construed as wilful]; *Burchett v Burchett*, 43 AD2d 970 [2d Dept 1974] [issue of ability to pay is vital to issue of wilfulness]). Plaintiff thus meets its burden of establishing, by clear and convincing evidence, that the Bobkers are in contempt of the order.

The Bobkers's contention that they are unable to pay is based on self-serving hearsay statements, and there is no reason to credit it, given findings here and in other cases that they routinely obfuscate their true financial status. In granting the installment order, I observed that the Bobkers exhibited a lack of forthrightness, and that their failure to comply with discovery and other orders warranted the reasonable inference that the documentation that they failed to disclose would show that they received income from previously unidentified sources. (NYSCEF 309). The referee found that their testimony bordered "on the unbelievable" and that it was "very very very difficult" to believe it. (NYSCEF 328).

In federal case, the judge granted the plaintiff an installment payment order against Joe Bobker, finding that Joe's testimony about his finances was "evasive and incredible," and that he had an "overall lack of candor" as well as a "general propensity to mislead and prevaricate." The judge also rejected Joe's claim that he could not perform significant work for the family business due to his physical ailments, observing that Joe produced no hospital or doctor's records to substantiate his claim. (*Lowy v Bobker*, 383 F Supp 2d 606 [SD NY 2005]).

Joe does not show that his medical condition has changed or worsened since the hearings before the referee in 2015, when the referee heard evidence concerning his condition and rejected it. He submits no medical evidence of his condition or proof of his social security or pension payments, including the amounts he allegedly receives therefrom. (*See Commissioner of Social Servs. v Rosen*, 289 AD2d 487 [2d Dept 2001] [respondent failed to show that he was unable to comply with order because of inability to pay; although he testified that he was retired, he also testified that he went to office and offered advice to employees without receiving compensation, and allegation that he was too old and ill to work was unsupported by credible evidence, including independent medical evidence]).

Eli offers letters from his employer that are neither notarized nor authenticated, and two of the statements contained therein contradict one another. In the letter dated August 27, 2015, the employer states that Eli earns $150,000, while the letter dated March 21, 2016 contains a breakdown of Eli's earnings which total approximately $80,000 per year without including bonuses. (NYSCEF 373). No explanation is offered as to this discrepancy.

A bankruptcy court order offered by Ben provides that he will collect an annual salary for $200,000 as manager of certain companies (NYSCEF 374), and he provides no evidence that he receives no income or salary from any other source. And, while the bankruptcy order was entered on June 30, 2015, the Bobkers made no mention of it or Ben's alleged new employment and/or salary when they filed their opposition to plaintiff's motion to confirm the referee's report on July 24, 2015. (NYSCEF 338).

None of the Bobkers submits copies of their personal tax returns or W-2s, and while they claim that the "Bobker Group is now largely defunct," they submit no evidence showing its financial status or affairs. They have not filed for personal bankruptcy, despite alleging that they are unable to pay their personal debts, including credit cards and mortgages. In short, the Bobkers fail to demonstrate that they are unable to pay the installment payments. (*See e.g. In re Fitzgerald*, 2016 WL 6773954, 2016 NY Slip Op 07646 [2d Dept 2016] [respondent held in contempt for failing to comply with order directing him to pay surcharge to trust; he failed to raise factual issue as to defense of inability to pay as he provided vague and conclusory allegations and incomplete documentation]; *Dietrich v Michii*, 57 AD3d 1527 [4th Dept 2008] [defendant properly found in contempt as she failed to comply with prior order and failed to submit credible evidence that she was unable financially to comply with it]; *see also Quantum Heating Servs. Inc. v Austern*, 121 AD2d 437 [2d Dept 1986] [defendants who gave vague and evasive answers to information subpoena found guilty of contempt as their claims that they had no means or property or income "unworthy of belief"]; *Astrada v Archer*, 71 AD3d 803 [2d Dept 2010] [party obligated to comply with court order no matter how incorrect party considers order to be, until order is set aside, as long as issuing court had jurisdiction to issue it]).

For the same reasons, the Bobkers fail to establish a change in their circumstances that would warrant a protective order or a modification of the order. The sole inference to be drawn from the Bobkers's conduct, taking into account their history of impeding enforcement of these and other judgments against them, as well as their failure to make any payments or attempt to modify the order or seek a protective order until after plaintiff filed the instant contempt application against them, is that this is another attempt to avoid payment of the judgments due plaintiff even if that means that they violate a court order in doing so. Eli and Ben also apparently made no attempt to obtain employment outside the family business, despite claiming for years that they were making little or no income from the family, until after I had issued an order requiring them to make installment payments and ordering a hearing as to whether income should be imputed to them.

Even if plaintiff violated the bankruptcy stay by filing the instant motion, there is no obstacle to my determining it now as closing arguments have been held in the foreclosure trial and it has thus presumably concluded. Moreover, the Bobkers may seek relief from the bankruptcy court for any alleged violation.

In light of the aforementioned history in this case, plaintiff also establishes that a fine in the form of plaintiff's attorney fees, costs, and expenses in making the contempt motion is warranted, as is the $250 fine. (*See Gottlieb v Gottlieb*, 137 AD3d 614 [1st Dept 2016] [attorney fees constituting actual loss or injury resulting from contempt routinely awarded as part of fine, including fees incurred in bringing contempt motion]; *Glanzman v Fischman*, 143 AD2d 880 [2d Dept 1988], *lv dismissed* 74 NY2d 792 [1989] [court properly awarded reasonable attorney fees incurred in connection with contempt application]).

For all of the same reasons, plaintiff shows that incarceration is warranted. (*See Astrada v Archer*, 71 AD3d 803 [2d Dept 2010] [defendant properly held in contempt for failing to comply with court order directing her to return down payment to plaintiff and directing her incarceration if she failed to return payment within specified time]; *Dietrich v Michii*, 57 AD3d 1527 [4th Dept

2008] [plaintiff established that defendant judgment debtor refused to obey prior order, and court providently exercised discretion in finding debtor in contempt and imposing term of intermittent incarceration]; *Riverside Cap. Advisers, Inc. v First Secured Cap. Corp.*, 57 AD3d 870 [2d Dept 2008], *lv dismissed* 12 NY3d 842 [2009] [affirming order of contempt against non-parties who controlled judgment debtor, imposition of fine in amount equal to plaintiff's unsatisfied judgment, and directive of non-parties' incarceration in event of failure to pay fine; non-parties transferred debtor's collateral and left it without most assets and refused to disclose information about assets' location]; *James Talcott Factors, Inc. v Larfred, Inc.*, 115 AD2d 397 [1st Dept 1985], *app dismissed* 67 NY2d 645 [1986] [defendant's corporate officers held in contempt of court for failure to comply with order requiring them to provide documents to plaintiff and incarcerated until they complied with order]; *see also Beacon Enlarged School Dist. v Tlumak*, 42 AD2d 701 [2d Dept 1973] [upholding finding of contempt and determination that defendants should be incarcerated therefor]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order holding defendants Eli Bobker, Ben Bobker, and Joe Bobker is granted and plaintiff is directed to file a proposed order of contempt; it is further

ORDERED, that plaintiff, along with a proposed contempt order, file an affidavit setting forth its request for reasonable attorney fees, costs, and expenses incurred in attempting to obtain defendants' compliance with the installment payment order, including the filing of the instant motion, and defendants may file opposition to the affidavit within 15 days of its filing; and it is further

ORDERED, that Defendants' cross motion is denied in its entirety.

ENTER:

Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: December 2, 2016
New York, New York

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

Amended Decision

PRESENT: ______________________ PART 12
Justice

Index Number : 601164/2009
GRAND PACIFIC FINANCE
vs.
97-111 HALE, LLC
SEQUENCE NUMBER : 012
OTHER RELIEFS

INDEX NO. 601164/09
MOTION DATE ______
MOTION SEQ. NO. 012

The following papers, numbered 1 to ____, were read on this motion to/for ______________________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Plaintiff is directed to contact the Referee Clerk in Room 119 m. 60 Centre Street to schedule hearing as ordered in Courts Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S): ______

Dated: 1/8/15

______ J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .... MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☑ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

---x

GRAND PACIFIC FINANCE CORP.,

Plaintiff,

- against -

97-11 HALE, LLC, 100-114 HALE, LLC, HALE CLUB, LLC, ELI BOBKER, BEN BOBKER and JOE BOBKER,

Defendants.

---x

Index No. 601164/09

Mot. seq. no. 012

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Paul H. Schafhauser, Esq.
Janice I. Goldberg, Esq.
Herrick, Feinstein LLP
2 Park Ave.
New York, NY 10016
212-592-1400

For Bobker defendants:
Eli Bobker, self-represented
Ben Bobker, self-represented
Joe Bobker, self-represented
11 East 36th St., Ste. 100-B
New York, NY 10016
212-213-2210

Plaintiff moves pursuant to CPLR 5226 for an order directing that the individual Bobker defendants (defendants) pay plaintiff in installments. Defendants oppose.

I. BACKGROUND

A. Pertinent procedural background

Plaintiff commenced this action in April 2009, alleging that defendants and three of their related entities, 97-11 Hale, LLC, 100-114 Hale, LLC, and Hale Club, LLC, breached promissory notes and guarantees in connection with certain real estate ventures. The justice previously presiding in this part granted summary judgment in favor of plaintiff, and on or about May 23, 2011, entered judgment against Eli, Ben, 97-111 Hale and 100-114 Hale, jointly and severally, for $11,258,597.32, and against Joe and Hale Club for $2,451,526.82, jointly and severally.

(NYSCEF 162).

What occurred thereafter is discussed at length in prior orders. For purposes of this motion, suffice it to say that defendants did not pay plaintiff, and that they, their spouses, and their office manager ignored postjudgment subpoenas and other disclosure devices, thereby requiring plaintiff repeatedly to move for orders compelling them to comply and holding them in contempt. (NYSCEF 163, 164, 165, 166, 167, 168). Contempt orders against defendants' spouses and office manager issued on September 20, 2012 and January 10, 2013. (NYSCEF 164, 165), and an order directing their incarceration issued on April 30, 2013, which was stayed until May 15 to permit them a final opportunity to comply with the orders. (NYSCEF 167). Having appeared for depositions, defendants' spouses and office manager were not incarcerated. Defendants also appeared for depositions.

Plaintiff had also moved pursuant to Limited Liability Company Law § 607(a), for an order charging defendants' membership interests in nine of their limited liability companies with the entire unsatisfied amount, plus interest. Defendants opposed and represented, among other things, that Ben's and Eli's only source of income was two entities known as Checkmate Holdings, LLC, and Bluebell Assets, LLC. (NYSCEF 210). By decision and order dated September 29, 2012, the prior justice granted plaintiff's motion and issued a charging order. (NYSCEF 171).

Defendants have never forwarded any distributions, proceeds or other sums from the charged entities pursuant to the order, nor have they tendered any other form of payment to plaintiff. (NYSCEF 160, 172).

On June 17, 2014, plaintiff served defendants by federal express overnight delivery addressed to their residences and care of their counsel at the time with the notice of motion and supporting papers, and duly e-filed them the same day. (NYSCEF 237).

On October 29, 2014, defendants failed to appear for oral argument on the motion, instead sending counsel who represented them in another matter and who was not retained in this action. I denied counsel's request for an adjournment (NYSCEF 302), and despite their failure to appear deemed the motion fully submitted.

B. General factual background

Joe, a real estate developer for over 30 years, has worked on hundreds of domestic and international development projects. In 2001 and in 2005, respectively, Ben and Eli joined their father in the real estate business. (NYSCEF 160). Together, they operated "the Bobker Group," which they describe as "a family owned group of companies and partnerships [that] has bought, sold and developed in excess of several billion dollars of residential and commercial real estate." (NYSCEF 179). The Bobker Group acquired and syndicated multi-family apartment buildings through its affiliate firm, Morgan Investment Fund, LLC (MIF) the website of which identifies Joe as its chairman, and Ben and Eli as co-directors. (NYSCEF 175). Defendants also own interests in limited-purpose limited liability companies, through which they manage real estate assets. (NYSCEF 182, 183).

In or about 2002, the Bobker Family Trust was formed, naming Eli, Ben, and their two brothers Dov and Avi as beneficiaries, with Eli and Ben also serving as trustees. (NYSCEF 184). The trust holds a membership interest in many of the limited-purpose LLCs, including 97-111 Hale and 100-114 Hale. Another trust, the Bobker Brothers Family Trust 2000, owns a residential property in Lawrence, New York, where Joe and his family live. (NYSCEF 180).

C. Eli

Eli lives with his family in Lawrence, New York. Of his seven children, five attend private schools. (NYSCEF 218, 219). Eli's spouse is a full-time licensed speech therapist, who, according to a 2010 tax return, earned approximately $30,000. (NYSCEF 215). Eli was admitted to the New York State bar in 2000, and before joining the Bobker Group, practiced law at Cadwalader, Wickersham & Taft, LLP. (NYSCEF 178).

Eli approximates his assets as of August 1, 2007 at $13,297,000, and his liabilities at $310,000, yielding a net worth of $12,987,000. Of the $13,297,000 in assets, $8,225,000 represented his 25 percent interest in Bobker Family Trust properties, $1,487,000 represented his 25 percent interest in Bobker Family Trust cash, and $575,000 represented his 25 percent interest in the Bobker Brothers Family Trust 2000. He valued his residence at $1,950,000. (NYSCEF 187). According to Checkmate's 2008 tax return, Eli owns a 99 percent membership interest in it. (NYSCEF 181).

From December 2011 through July 2012, Eli and his spouse maintained balances in their joint checking account of at most $2,000. (NYSCEF 214). In 2008, they paid $15,319 in mortgage interest and $15,270 in real estate taxes (NYSCEF 217); in 2009, $70,208 in mortgage interest and $33,779 in real estate taxes (NYSCEF 216); and in 2010, $114,000 in mortgage interest and $47,639 in real estate taxes. (NYSCEF 215).

At a deposition held on October 5, 2011, Eli testified that he and Ben scout properties and develop and manage real estate projects for the Bobker Group, and that recently, he spends much of his time on litigation involving his entities, using Checkmate to manage his daily real estate operations. Although MIF received management fees for their services, Eli denied that either he or Ben received compensation from it. (NYSCEF 178).

In or around August 2012, Eli disclosed a 25 percent interest in the Bobker Family Trust, admitting that since 2009, he received $30,000 in draws and capital repayments from Checkmate, while denying that he owned income-producing assets. (NYSCEF 185).

At a deposition held on May 6, 2013, Eli's spouse denied knowing how the mortgage or real estate taxes, household expenses, utilities, or insurance premiums were paid or the sources of Eli's income, and denied receiving any bills, claiming that Eli takes them to work. She also denied knowing how they maintained their home and paid $120,000 a year in interest and taxation on her $30,000 salary, although she allowed that her parents provided some assistance. (NYSCEF 212).

At a deposition held on July 8, 2013, Eli testified that he manages a property known as Cornwall Park, and also distributes proceeds to investors in it whom he is unable to identify. He denies drawing an income or salary from any source. He stated that Checkmate, which has no employees, was formed to conduct real estate deals, and that it acts as a management vehicle for other real estate ventures. Eli attested to using a Checkmate credit card for business expenses, and that its line of credit is decimated, at approximately $40,000 plus interest. (NYSCEF 180).

On April 4, 2014, Eli, identifying himself as manager of Hancock Park, LLC, which he represented as the sole member of MIF, affirmed that MIF paid $15,000 in retainer fees for counsel to represent its affiliates Bay Condos, LLC, 11 East 36th, LLC, and Morgan Lofts, LLC, debtors in bankruptcy proceedings in the Southern District of New York. On June 11, 2014, Eli affirmed that an additional $2,500 was paid. (NYSCEF 271).

D. Ben

Ben also lives with his family in Lawrence where his five children attend private schools. By letter dated January 6, 2014, one of the school directors estimates that annual tuition ranges from $18,000 to $27,000, and that in light of the family's alleged financial difficulties, the school has allowed Ben to pay $640 per month for the 2012 to 2013 school year, and $830 per month for the current year. (NYSCEF 225). Ben's spouse is employed as an occupational therapist, who reported on the family's 2011 tax return an annual salary of $23,089. (NYSCEF 222). Court records reflect that Ben was admitted to the New York State bar in 2002, and that his license to practice law was suspended in 2006, although there is no indication as to whether or when he can seek reinstatement.

Ben valued his assets as of September 1, 2006 at $12,845,250, and his liabilities at $310,000, yielding a net worth of $12,535,250, and he valued his residence at $1,400,000 and his investments in closely held-companies at $11,320,250 as of the same date. (NYSCEF 220). Ben owns a 99 percent membership interest in Bluebell, as reflected in its 2008 tax return (NYSCEF 183), stated that he held a 25 percent interest in both family trusts, and approximated the fair market value of Bluebell and the trusts as minimal due to losses in the real estate market, foreclosure actions, and ongoing litigation, and he denied owning any income-producing assets (NYSCEF 186).

From December 2011 through August 2013, Ben and his spouse maintained a joint checking account reflecting balances never exceeding $2,000. (NYSCEF 221). In 2009, they paid $18,653 in mortgage interest, and $11,765 in real estate taxes, and reported a total income of $18,767. (NYSCEF 224). In 2011, they paid $19,863 in mortgage interest, and $15,862 in real estate taxes. (NYSCEF 222). During 2009, 2010 and 2011, they reported a total income of $18,787, $11,961, and $12,585, respectively. (NYSCEF 222-224).

At a deposition held on October 24, 2011, Ben testified that he sets up individual LLCs for each real estate project for which Bluebell serves as the LLC managing member. He recalls receiving a salary from Bluebell within the last three years, but could not state when, and denied receiving any compensation, distribution, or salary. He could not recall the last time he was paid.

At a deposition held on May 16, 2013, Ben's spouse denied knowing whether Ben drew any salary despite admitting that he goes to work every day, explaining that she does not speak to him about his business and that he handles all finances and pays all bills. Thus, she has no idea how Ben pays their expenses or the source of their money. (NYSCEF 211).

At a deposition held on July 15, 2013, Ben testified that most of his personal expenses are paid by him through two of his corporate entities, Morgan Lofts and 11 East 36th, each of which filed for bankruptcy protection in May 2013. He confirmed that he and Eli regularly work in the Bobker Group office. (NYSCEF 177, 227, 228).

On January 20, 2014, Ben, identifying himself as the managing member of MIF, affirmed that it paid $15,000 in retainer fees for counsel to represent 11 East 36th and Morgan Lofts in connection with their bankruptcy proceedings. (NYSCEF 271).

On or about August 11, 2014, 11 East 36th and Bluebell obtained financing of $18.3 million to extinguish prior mortgages encumbering the assets of 11 East 36th. The loan commitment letter requires Ben's personal guarantee. (NYSCEF 273).

E. Joe

In 2007, Eli valued Joe's residence at $3.7 million. (NYSCEF 187).

At a deposition held on October 5, 2011, Eli testified that Joe is involved in all aspects of the business, including consulting and advising the group, meeting potential investors, architects and builders, and negotiating contracts. (NYSCEF 178).

At a deposition held on October 27, 2011, Joe testified that he works for his children, mostly from home but that he goes to the Bobker Group office at least two days a week. He alleges that his children compensate him annually between $100,000 and $150,000 for his services by paying his family living expenses from family trusts but was not sure from which entity as his spouse, Miriam, keeps all the books and records. (NYSCEF 173).

In a petition dated December 22, 2011, affirmed by Joe in the course of a bankruptcy proceeding, Joe identified himself as a member of the debtor, Hancock Park. In January 2012, he submitted a declaration in the bankruptcy court affirming that he is the managing member of Bay Condos. (NYSCEF 275, 276).

In 2012 and 2013, Joe denied any income-generating assets, personal bank accounts, monies in trust, mutual funds, IRA accounts, securities, and to his knowledge, he was not a beneficiary of a trust or will or life insurance policy. (NYSCEF213, 230). At depositions held on February 26 and February 28, 2013, Joe testified that, except for the expenses paid by his children through their entities, he has no income; Miriam provides him with cash when he needs it as she handles their household finances. He denies knowing the source of Miriam's funds which she uses to buy food and clothing, or which household bills are paid by the family trusts. He denied belonging or having any interest in any entities, including Bay Condos or Hancock Park and when shown a schedule K-1 tax return reflecting that he and Miriam each own 50 percent of Cond Co., LLC, and $5,201 in ordinary business income, Joe professed ignorance of it, stating that he had only recently learned of that entity's existence which he believed was set up solely for "health insurance purposes." He also disclaimed an understanding of tax returns. When asked about his relationship to MIF, the following colloquy ensued:

> Q. Are you the chairman of the Morgan Investment Fund?
> A. I can be if you want me to be. I'm the ambassador of good will. I am the chairman. I am the don. Is that the word for it? I am what they used to call the gray in business. Bring in the gray. I am the eldest statesman. I'm the foreign minister. I'm the — so, yes. I don't have a business card that says I'm the chairman. I don't have a letterhead that says I'm the chairman. And the Bobker Group is not a legal entity, so it's not like I'm listed anywhere as chairman, but on the website, which you know is a marketing tool, if chairman sounds good, yep, I'm the chairman.
> Q. Were you aware that you were listed as a chairman on the Morgan Investment Fund's website?
> A. I have not looked at this for probably five years from whenever it was formed. When it was done, yeah, I read it and I, obviously, had no problems with it.
> Q. And do you introduce yourself in any capacity as chairman of the Morgan Investment Fund?
> A. I have never in my life introduced myself as chairman of the Morgan Investment Fund.
> Q. Do you hold any offices on behalf of the Morgan Investment Fund?
> A. Offices? Do you mean a physical space.
> Q. No. Let me try it again. Are you an officer of the Morgan Investment Fund?
> A. Who knows?
> Q. Does the Morgan Investment Fund have a board?
> A. Not that I'm aware of.
> Q. Do you receive any moneys directly or indirectly as a result of your, as you said ambassadorship or chairmanship of the Morgan Investment Fund?
> A. I don't know how to answer that. This falls under the same category that I gave you on Tuesday, where I perform services for my sons in their real estate activities under the various real estate entities that they have. If any of the compensations that I get from my services comes directly or indirectly from Morgan Investment Fund, I have no way of knowing.

(NYSCEF 209, 213, 282).

Although Joe testified that he filed tax returns for all but the past two years, he has produced none.

At a deposition held on May 3, 2013, Miriam testified that Joe occasionally worked, and that although he had a credit card in his name, he did not pay those bills and had no access to their checking accounts. She claimed that she has credit cards in her name that Ben paid, that Ben had primary responsibility for paying their household expenses, that whoever has money at a given time pays, and she denied knowing the source of the funds. (NYSCEF 231, 283).

Ben testified at his deposition on July 15, 2013 that since 11 East 36th filed for bankruptcy in early 2013, he could no longer pay his parents' expenses. (NYSCEF 177).

At a deposition held on December 11, 2013, Dov testified that his father's home is filled with 50 to 100 paintings and that it was substantially renovated over the past several years. (NYSCEF 236).

II. CONTENTIONS

Plaintiff alleges that defendants are attempting to impede its collection efforts by rendering services without compensation while maintaining an affluent lifestyle and despite their claims of little to no income. It observes that Ben and Eli claim less than $100,000 in compensation over the past three to five years, Joe, nothing, and that, for the recent years, Ben's mortgage interest and real estate tax payments alone greatly exceed his family's taxable income. Moreover, Morgan Lofts and 11 East 36th, which had paid Ben's personal expenses, have been in bankruptcy since early 2013.

Plaintiff claims that its efforts to unearth defendants' current financial situation have been fruitless given defendants' failure to produce current financial documents, and that their obstinacy raises the inference that they receive funds from undisclosed sources. (NYSCEF 160, 161).

Plaintiff submits a report from an accounting expert who states that, based on materials given to him by plaintiff's counsel, it is "apparent" that defendants receive money from one or more undisclosed sources and render real estate services without "receiving acknowledged compensation." He estimates that the reasonable value of services rendered by defendants as $2,400,000 per year; $500,000 for Joe, and $950,000 each for Eli and Ben. (NYSCEF 232). Plaintiff thus seeks an order directing that defendants make periodic payments totaling $600,000 annually, or 25 percent of the value of their alleged services: $125,000 from Joe and $237,000 from Ben and Eli. (NYSCEF 159).

In opposition, defendants argue that service of the motion was defective as it was mailed by federal express, and on a lawyer that does not represent them.

Otherwise, relying on the market crash of 2008, defendants maintain that the Bobker Group has not been profitable, and they deny involvement in any new development projects since 2009, focusing instead on litigation and bankruptcy matters involving their entities in order to reduce legal expenses, and working "to keep afloat certain prior investments." (NYSCEF 267). Ben and Eli each claim to expend, on average, no less than 30 hours, and sometimes as many as 60 hours a week on legal work, consisting of reviewing pleadings, motions, discovery demands, and other legal documents, compiling and organizing discovery responses, digesting depositions, consulting with their counsel and apprising it of court deadlines, and attending court conferences. Ben and Eli attest to having revised and edited "all documents our attorneys have submitted" and Eli claims to have reviewed "every pleading" in connection with the litigation. (NYSCEF 239, 256).

Defendants contend that substantially all of the value of Eli's $13 million net worth in 2007 was from three projects, one of which is now in bankruptcy, one which was lost in foreclosure, and the other concerns properties in the midst of foreclosure proceedings. They also deny that any of their other properties produce income or have value sufficient to support the payment plaintiff seeks or that they are paid salaries claiming that the investments they manage have no cash and disburse no funds. (NYSCEF 239, 256, 265, 267). They characterize their lifestyles as modest, and claim that their income, less necessaries, leaves no cash for any monthly installment payments. They deny undisclosed income, underpaying themselves, or using their businesses to pay their personal expenses. (*Id.*)

Eli and Ben, who both support large families, claim that they work full-time representing themselves in litigations, that they have lived off their spouses' monthly incomes of respectively, $2,500 and $2,700, depleted savings, credit card debt and lines of credit, and that they are in arrears with their children's tuition. They deny receiving business income since 2009, or having paid the mortgage, real estate taxes, or insurance on their homes. They claim monthly expenses of respectively, $8,500 and $6,000. Eli claims $40,000 in credit card debt and in excess of $145,000 in lines of credit. (NYSCEF 239, 256).

Defendants now submit Eli's and Ben's previously withheld 2012 federal income tax filings. Eli's reflects $5,291 in wages and salaries, and $20,000 in "rental real estate, royalties, partnerships, S corporations, trusts, etc." (NYSCEF 247). The corresponding amounts for Ben's are $16,973 and $27,783. (NYSCEF 260).

Joe claims to be semi-retired due to health concerns, only working approximately 20 hours per week on his own litigation matters, and that his home is in foreclosure, with the bank making payments to maintain its interest in the house. He denies any investments or income producing assets, or having provided any compensable real estate services to his sons' businesses. He denies having consulted on any real estate deals since approximately 2009. (NYSCEF 265).

By affidavit dated August 18, 2014, Miriam states that she is unemployed, that she and Joe live off a small inheritance, and that she budgets approximately $7,000 per month for personal and family expenses. (NYSCEF 266).

In defendants' view, plaintiff fails to sustain its burden of offering evidence of their current or future income, or that they are attempting to defraud it by providing services to themselves. They claim that plaintiff's expert's report is irrelevant, as it is based on the services they rendered before 2008, whereas they claim that they have performed no real estate work since then. They maintain that their business depends on each project, that their family expenses should not be considered in determining installment payments, and that value cannot be imputed from past services or alleged income. They also assert that penalizing them for exercising their constitutional right to represent themselves in their legal matters is akin to reinstating slavery or debtors' prisons. Alternatively, defendants contend their evidence is sufficient to warrant a trial on the issue of their reasonable requirements, or reference to a referee. (NYSCEF 267).

In reply, plaintiff urges that any irregularities in its manner of service should be disregarded absent any prejudice to defendants. It observes that the evidence on which it relies is the product of defendants' refusal to produce recent documentation concerning the financial status of their entities, and that an adverse inference should be drawn that more recent documentation would show that defendants are able to pay. Plaintiff argues that at any rate, the documentation produced does not undermine its expert's opinion, which is based on the current reasonable value of defendants' services, which defendants fail to rebut with their own expert. It also seeks a hearing or trial if warranted. (NYSCEF 269, 270).

Plaintiff asserts that defendants' denials that they own valuable or income-producing assets are conclusory and self-serving, as is their contention that they are no longer involved in real estate development, which also contradicts their and their spouses' prior deposition testimony, including Eli's testimony that he is not compensated for managing Morgan properties, as well as MIF's website identifying defendants as directors and describing its current projects. It claims that Joe's characterization of himself as semi-retired is incredible given a judicial finding in 2005 that his claims of poor health and an inability to work were unfounded and misleading. (*Lowy v Bobker*, 383 F Supp 2d 606, 614 [SD NY 2005]).

Plaintiff also maintains that the statute authorizing installment payments is intended to assign value to defendants' uncompensated services, and that it is not obliged to prove defendants' fraudulent intent. It claims that defendants, who have extensive real estate experience, and in Eli's and Ben's cases, law degrees, are highly employable, but instead of obtaining employment elsewhere, which would create an identifiable source of income, they continue to work on behalf of entities they portray as destitute and hopeless, raising the inference they are impeding its collection efforts. (NYSCEF 269).

Plaintiff argues that Eli's and Ben's allegation that they support themselves on credit card debt and their spouses' income contradicts their spouses' deposition testimony that their expenses are paid by Eli and Ben from unknown sources, and that Miriam's claim that she and Joe rely on an inheritance contradicts her prior testimony that her sons pay their expenses. In plaintiff's view, Ben's use of funds from Morgan Lofts or 11 East 36th to pay personal expenses, defendants' noncompliance with discovery, Ben and Eli's recent disclosure of their tax returns which show unexplained real estate income, all raise the inference that there exist other entities from which defendants siphon funds to pay for personal expenses. Plaintiff also argues that Ben's recent loan guarantee proves that he has sufficient equity to secure the loan, otherwise such a large loan would have not been made. (*Id.*).

Plaintiff contends it is defendants' burden to establish their reasonable requirements, which they have not established with their unsupported and conclusory allegations concerning their monthly expenses, particularly given their continued refusal to disclose documentation of their actual expenses, such as credit card and utility statements and insurance policy information. (*Id.*).

III. ANALYSIS

A. Service

The notice of motion for an installment payment order "shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested." (CPLR 5226). A mistake or defect in service may be disregarded in the absence of prejudice of a substantial right. (CPLR 2001).

Here, defendants do not dispute that they timely received the notice of motion. Absent any allegation of prejudice, and in the circumstances presented here, service of the notice by federal express is overlooked. (*See Jones v Lefrance Leasing L.P.*, 81 AD3d 900, 902-903 [2d Dept 2011] [service of cross motion via media mail, as opposed to first-class mail was mere irregularity which did not substantially prejudice opponent, who opposed motion on merits]; *M Entertainment, Inc. v Leydier,* 71 AD3d 517, 518 [1st Dept 2010] [pursuant to CPLR 2001, Appellate Division, in its discretion, disregarded irregularity in service of notice of appeal in absence of prejudice]; *Horvath v Progressive Cas. Ins. Co.*, 24 Misc 3d 194, 202 [Dist Ct, Nassau County 2009] [service by regular, rather than certified mail is technical, non-prejudicial defect under CPLR 2001]).

As defendants are self-represented, plaintiff's service on their alleged former counsel is of no consequence.

B. Installment payment order

Pursuant to CPLR 5226,

> where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor
> . . . . .
>
> In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents . . . the amount due on the judgment . . . or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

The purpose of an installment payment order is to compel the payment of judgments by those able to do so. (*Allstar Capital, Inc. v Curry*, 28 Misc 3d 513, 515 [Sup Ct, New York County 2010], *citing Bergman v Buechler*, 249 AD 553 [1st Dept 1937]).

Installment payment orders allow a creditor to thwart "payment-avoidance schemes." (Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 5226.08):

> A frequently employed scheme finds the judgment debtor and his wife, or some other relative, in control of a corporation or other business enterprise. The judgment debtor claims that the business belongs to his relative and that he is merely an employee at a salary of a few dollars a week. The courts have either rejected such allegations as preposterous or shown, by simple mathematics or extrinsic facts, that the salary paid was not a measure of the debtor's compensation.

(*Id.*).

The burden rests on the judgment creditor to establish that the judgment debtor receives or will receive money that is not exempt from installments papers, or that the judgment debtor is rendering services without adequate compensation. (*Id.* ¶ 5226.11). "[W]hen it is not possible to determine what the debtor's services are worth, a showing that the debtor is getting enough money from some source to be enjoying the standard of living equivalent of a person earning a higher sum should suffice to enable the court to require the debtor make periodic payments out of the assumed sum." (*Couture Brand Holdings, LLC v Falchi*, 2009 NY Slip Op 30742[U] [Sup Ct, New York County 2009], *citing* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C53226:3]).

It is the judgment debtor's burden to prove his reasonable requirements. (Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 5226.11; *Lowy*, 383 F Supp 2d at 615, *citing Camphill Special Schools, Inc v Prentice*, 126 Misc 2d 707, 708 [Sup Ct, Onondaga County 1984] and *Dickens v Director of Fin.*, 45 Misc 2d 882, [Sup Ct, New York County 1965]; *Adirondack Furniture Corp. v Crannell*, 167 Misc 599 [Cty Ct, Saratoga County 1938]). Issues of fact concerning the debtor's earnings or reasonable requirements may be tried by the court pursuant to CPLR 2218, or heard by a referee, pursuant to CPLR 4001. (Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 5226.11, and cases cited therein). "The test is what the judgment debtor can reasonably afford to pay, taking into consideration his needs, those of his dependents, and other inroads on his income from other obligations." (*Kaufman v Kaufman*, 29 AD2d 922 [1st Dept 1968]).

The installment payment statute is constitutional (*see* Weinstein-Korn-Miller, NY Civ

Prac CPLR ¶ 5226.05; *Reeves v Crownshield*, 274 NY 74 [1937]; *F.E. Compton & Co v Williams*, 248 AD 545 [4th Dept 1936]), and defendants cite no authority for the proposition that I am constitutionally compelled to disregard the free legal services they render to their entities. Rather, authority is to the contrary.

In *Matter of Brown*, the court issued an installment order against a debtor who rendered free pastoral services to various entities. (179 Misc 221 [Sup Ct, New York County 1942], *affd* 265 AD 802 [1st Dept 1942], *lv denied* 289 NY 852 [1943]). That the pastor had a constitutional right to practice his religion did not prevent the court from assigning a value to his religious services. Notwithstanding that one is free to offer legal services without compensation, one may not do so at the expense of creditors. (*Id.* [debtor may not render free services at creditor's expense]; *cf. Joseph M. v Lauren J.*, 45 Misc 3d 1211[A], 2014 NY Slip Op 51536[U] [Sup Ct, New York County 2014] [while wife free to offer health and nutrition services without compensation pursuant to religious obligation, having "purposefully reduced her ability to be self-supporting," downward deviation in maintenance warranted]).

In a case that predates the installment payment statute, the Court held that a creditor had no claim to a debtor's gratuitous services to a spouse (*Abbey v Deyo*, 44 NY 343 [1871]), and in *Crenshaw v McKinley*, 116 F2d 877 (2d Cir 1941), gratuitous services to a spouse were held not to constitute fraudulent transfers under the Bankruptcy Act. They are inapposite.

Defendants also cite no authority indicating that a creditor seeking installment payments must demonstrate fraudulent intent.

Based on the parties' submissions, I find as follows:

Ben and Eli demonstrate that they have large families to support and expensive residences to maintain, and their most recently disclosed federal income tax filings reflect that they cannot afford to pay any installment payments. Plaintiff, however, demonstrates through defendants' testimony, as well as their more recent admissions, that they work on their investments, that they still manage certain entities and properties, and that they are engaged in the real estate business. Eli's and Ben's contention that they work on their investments solely to the extent of keeping them afloat is too vague and conclusory to prove that they are not or could not be compensated for that work, and their most recently disclosed tax returns reflect that they have derived income from their real estate services in 2011. Additionally, the August 2014 offer to extend a $18.3 million loan based on Ben's personal guarantee, demonstrates not only that Ben is working in the real estate business, but that he has resources sufficient to warrant the extension of a large loan. And, absent any support, documentary or otherwise, for Ben's and Eli's assertion that they perform legal services to their entities to reduce their legal fees, they prove only that they are employable as lawyers, and highly paid supervisory lawyers at that, unjustifiably performing these services without compensation.

Joe's equivocations concerning his relationship with the Bobker Group and MIF, and his family's testimony that he works for his sons warrant the conclusion that he too, is involved in the real estate business. In any event, Joe admitted that his sons, through their trusts, compensate him for his services, notwithstanding his more recent claim that he has not consulted on any real estate venture since 2009. (*See City of Albany Indus Dev Agency v Garg*, 268 AD2d 784, 786 [3d Dept 2000] [proper for court to consider non-money transfers, non-arms-length transactions, gifts to and from children as income under CPLR 5226]). The claims advanced by Joe and the findings based thereon in the 2005 federal litigation are not considered.

Moreover, defendants' lack of forthrightness and failure to comply with discovery and the charging order, particularly Joe's willful blindness concerning his own finances, and his failure to produce recent financial documents, including those as rudimentary and easy to disclose as tax returns, warrant the reasonable inference that had they complied, the material disclosed would show that they receive funds from undisclosed sources. (*Gryphon Dom. VI, LLC v APP Intern. Fin. Co., B.V.,* 18 AD3d 286, 287 [1st Dept 2005] [adverse inference may be drawn from party's failure to produce documents in its control]). Under these circumstances, defendants' disingenuous complaint that plaintiff's expert relied on dated evidence is not considered.

For all of these reasons, defendants' own testimony and the few documents that they have produced, as well as plaintiff's expert's conclusions regarding defendants' current activities, satisfy plaintiff's burden of proving that defendants render services without receiving adequate compensation (*see Nutmeg Fin. Services, Inc. v Richstone,* 186 AD2d 58, 58-59 [1st Dept 1992] [rejecting debtor's contention that he earns only $1,000 a week as physician in affluent part of city; finding he rendered services without adequate compensation to impede recovery of judgment]; *Couture Brand Holdings, LLC, supra* [ordering installment payment; defendant's profession and standard of living incompatible with alleged annual salary]), and that defendants' past, and present employment, for apparently little to no pay, evinces an intent to frustrate plaintiff's attempt to collect on its judgment absent court intervention.

IV. CONCLUSION

Accordingly, I refer this matter to a referee, empowered to make credibility findings, to hear and determine the reasonable value of defendants' services and requirements (*see Edelman v Edelman*, 83 AD2d 622 [2d Dept 1981] [ordering hearing to determine reasonable requirements]; *Chem. Bank v Sylvester Builders, Inc.*, 124 Misc 2d 148, 149 [Sup Ct, New York County 1983] [ordering hearing and report on fair and reasonable value of service rendered]), and thus it is hereby

ORDERED and ADJUDGED, that plaintiff's motion for an installment payment order against defendants Ben Bobker, Eli Bobker, and Joe Bobker is granted; and it is further

ORDERED, that the matter is referred to a special referee to hear and determine the reasonable value of defendants' services and requirements.

ENTER:

Barbara Jaffe, JSC

DATED: January 8, 2015
New York, New York